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Supreme Court, U.S.
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No. 04-1047

In The Supreme Court of the United States

WARNER-LAMBERT COMPANY and PFIZER INC.,

Petitioners,

v.

MARY ROSE WAKEFIELD, INDIVIDUALLY, AS PERSONAL REPRESENTATIVE, TRUSTEE, EXECUTOR OF THE ESTATE OF MICHAEL HOLMES WAKEFIELD AND MARY LOUISE WAKEFIELD,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Civil Appeals

REPLY ON PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent's Brief in Opposition ("R. Br.") virtually ignores the reasons for granting certiorari. Instead, respondent devotes almost all of her brief to arguing that certain questions – but not the specific Questions Presented – were not preserved. As shown in Point III, *infra*, the Questions Presented were raised in and specifically addressed by the court below, and the points in the petition are all "fairly included" within those questions. Sup. Ct. R. 14.1(a). What little argument respondent offers on the issue of whether certiorari should be granted does not refute petitioners' showing that the punitive damages were calculated on the basis of world-wide sales and profits from an FDA-approved drug, which squarely conflicts with *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America v. Gore*, 517 U.S. 559 (1996), and presents significant issues for this Court's review.

As discussed in the petition and in the *amicus* briefs submitted in support thereof, the context for the Questions Presented is that a jury was instructed by counsel and permitted to calculate punitive damages regarding a prescription drug on the basis of worldwide sales figures, when those sales were lawful because the drug was approved for sale by the FDA and foreign regulatory agencies. That result creates a risk of excessive, multiple punishments based on out-of-state conduct. Moreover, that conduct lacks the requisite "nexus" to any harm to this plaintiff and has no relationship to reprehensibility, because worldwide sales necessarily include sales to everyone who benefitted from the drug and did not sustain any harm. That result also allows a jury to become a *de facto* national regulator of what prescription drugs may be sold nationally, contrary to this Court's holding that a state may not "use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *BMW*, 517 U.S. at 585. That power undermines the FDA's expert determination that a drug should be on

the market because its benefits outweigh its risks, and chills the incentive to develop vitally needed medications, adversely affecting health care. Respondent's brief simply ignores these and other important legal and policy considerations, which flow from *BMW* and *State Farm*. In addition, this petition is an ideal vehicle for this Court to examine the holdings of these two landmark decisions in a product liability/personal injury case, because plaintiff argues that those cases apply only where economic injury was claimed.

ARGUMENT

I. RESPONDENT ADMITS THAT THE JURY WAS TOLD TO CALCULATE PUNITIVE DAMAGES ON THE BASIS OF WORLDWIDE REZULIN SALES AND PROFITS, AND THE HOLDING OF THE COURT BELOW THAT THIS CALCULATION IS CONSISTENT WITH *BMW* AND *STATE FARM* UNDERSCORES THE NEED FOR CERTIORARI

The ***only*** "evidentiary support for the award of punitive damages" identified by the Oklahoma Court of Civil Appeals was "evidence of the dollar amount of world-wide gross sales of Rezulin – $48 million per month," and alleged "expert testimony that [Warner-Lambert's] profit margin on Rezulin sales was thirty percent." App. 17. Such profits, the court held, "clearly provided a basis for jury determination" under the Oklahoma punitive damages statute, 23 OKLA. STAT. § 9.1(C), of "the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities." *Id.* Thus, the highest state appellate court to hear this case expressly found that the punitive damage award was based on worldwide sales and profits. That disposes of respondent's assertion that petitioners are asking the Court to "speculate" about the basis for the award. R. Br. at 4.

This punitive damage award is directly contrary to *State Farm* and *BMW*. In *BMW*, 517 U.S. at 572-73, the Court held that a State "does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [that State] or its residents." Respondent had the burden of showing that the out-of-state conduct was unlawful. *Id.* at 573. But there was no evidence as to the law of any other state, and the jury was not asked to apply such law. Thus, there was no basis on which the jury could have found that all of the worldwide sales of Rezulin were unlawful. Nor does respondent even argue that they were. By upholding punitive damages calculated on the basis of worldwide sales and profits, the courts below improperly punished petitioners for conduct – selling Rezulin – that was "lawful where it occurred" and "had no impact on [Oklahoma] or its residents." *Id.* at 572-73.

The court below held that the award does not punish defendants "for conduct legal in other states." A. 18. Indeed, respondent asserts that Warner-Lambert's conduct was "not legal in any state." R. Br. at 23. A grant of the petition is warranted to clarify and re-affirm this Court's holding that states have no "legitimate concern in imposing punitive damages to punish a defendant" even for "unlawful acts committed outside of the state's jurisdiction. . . . [E]ach State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm*, 538 U.S. at 421-22. *Axen v. American Home Prod. Corp.*, 158 Or. App. 292, 316, 974 P.2d 224, 240 (1999), on which respondent relies, is not to the contrary, because the punitive award in that case was not calculated on out-of-state sales.

Worldwide sales, which include sales to every diabetic who benefitted from and had no complications from Rezulin treatment, also have no "nexus to the specific harm suffered by the plaintiff," as required by *State Farm*, 538 U.S. at 422. No such nexus was identified by the court below. Respondent ignores the argument.

Moreover, basing a punitive award on worldwide sales violates the Due Process Clause prohibition against "arbitrary punishments" (*id.* at 409), for the reasons explained in the Petition at 21-22. Respondent ignores the issue. Contrary to *BMW*, 517 U.S. at 574, petitioners had no "fair notice" that this arbitrary factor could be used to calculate punitive damages. No such notice is provided by 23 OKLA. STAT. § 9.1(C), because worldwide sales have no relationship to any "increased financial benefit" derived "as a direct result of the conduct causing the injury." As respondent correctly states, "global sales" are "wholly distinct" from "wrongful acts in other states." R. Br. at 25. Yet, punitive damages in this case were improperly assessed on the basis of global sales and purported profits.

Petitioners were further denied due process because there was no evidence of the actual profit margin for Rezulin while it was on the market, and accordingly there was no basis for any finding of "financial benefit" to Warner-Lambert "as a direct result of the conduct causing the injury." Respondent's assertion that Rezulin had a 31.7% profit margin in 1999 is false. R. Br. at 22.[1] Nor could the jury "infer" the amount of Rezulin profits from Oklahoma (R. Br. at 23) when there was no evidence of sales, profits, or prescriptions in Oklahoma.

Respondent's argument that the punitive award is justified in light of Warner-Lambert's alleged "misdeeds" and "reprehensibility" (R. Br. at 3, 28) further illustrates the need to clarify and re-emphasize this Court's decisions. *State Farm* held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant

[1] Exhibit 2946, cited by respondent, was specifically identified at trial as a "forecast for sales and profitability" that "projected" profit margins, and therefore is not evidence of actual profits. Respondent correctly states that Exhibit 2286 shows that Rezulin had $48.7 million "net sales" in January 1998, but does not mention the testimony that net sales are simply "sales less rebates and discounts," not profits. R.3806, Tr. 2104.

under the guise of [a] reprehensibility analysis." 538 U.S. at 423. Nevertheless, many state courts have used a "reprehensibility analysis" to approve punitive damages based on out-of-state conduct, nullifying that principle.[2]

Respondent's argument that the jury could properly consider Warner-Lambert's "net worth" or "financial condition" in assessing punitive damages misstates the basis for the award. R. Br. at 4-5, 24. In summation, respondent's counsel did not ask the jury to award punitive damages based on net worth or financial condition, but on alleged profits from worldwide Rezulin sales, in a range of $21-$600 million. R.3823, Tr. 3410. Respondent concedes that her counsel made this argument. R. Br. at 29. And this was the sole "evidentiary support" for the calculation of punitive damages found by the Court of Civil Appeals. A. 17.

Respondent argues that evidence of worldwide Rezulin sales came from Warner-Lambert's annual reports that defendants offered at trial. R. Br. at 2. But the fact that evidence is properly admitted does not mean that it can be used for an unconstitutional purpose. The only reference at trial to the sales figures in the annual reports was by respondent's counsel during her summation in the punitive damages phase.

Respondent says that there is no conflict among lower courts, so that petitioners "merely" argue that the decision below conflicts with U.S. Supreme Court authority. R. Br.

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[2] *See, e.g.*, *Boeken v. Philip Morris, Inc.*, 2005 WL 737511, at *32-42 (Cal. Ct. App. April 1, 2005) (upholding punitive damages of $50 million, a 9:1 ratio, based on out-of-state conduct); *Williams v. Philip Morris, Inc.*, 193 Or. App. 527, 559 n.8, 92 P.3d 126, 143 n.8, *review granted*, 337 Or. 669, 104 P.3d 601 (2004) (court upheld punitive award in a 96:1 ratio by holding that "all of the out-of-state conduct . . . led to actions within Oregon or that were directed to Oregonians [so] Oregon has the authority to punish defendant for such conduct"); *Craig v. Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003) (using reprehensibility analysis to uphold a 22:1 ratio); *Bocci v. Key Pharm., Inc.*, 76 P.3d 669, 674 (Or. Ct. App. 2003) (using same analysis to uphold a 7:1 ratio).

at 5. But that decision and the state court cases cited in n.2, *supra*, do conflict with appellate decisions that conform to *State Farm* and *BMW*. *See, e.g., White v. Ford Motor Co.*, 312 F.3d 998, 1020 (9th Cir. 2002); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997). That is yet another reason why certiorari should be granted. Notably, contrary to respondent's assertion that only a "small fraction" of cases involving Rezulin remain (R. Br. at 6), thousands of such cases are still pending in the federal MDL court and various state courts, so these issues could arise again in the same context.

II. THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE

Respondent argues that *State Farm* and *BMW* are limited to cases involving economic damages. But this Court has not said that, and in numerous product liability cases involving physical harm it granted certiorari, vacated the punitive damages judgment, and remanded for reconsideration in light of *State Farm*.[3] Moreover, lower courts have applied *State Farm* and *BMW* to punitive damage awards in personal injury/product liability cases. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing punitive damages in product liability case to a 1:1 ratio, based upon *State Farm* and *BMW* analysis). To the extent that the Oklahoma Court of Civil Appeals and other courts might accept respondent's contention that *State Farm* and *BMW* are inapplicable to personal injury cases, that is another reason for granting certiorari.

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[3] *See Philip Morris USA, Inc. v. Williams*, 504 U.S. 801 (2003); *Key Pharms., Inc. v. Edwards*, 538 U.S. 974 (2003); *Anchor Hocking, Inc. v. Waddill*, 538 U.S. 974 (2003); *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003).

Respondent's argument that the punitive damage award was not unconstitutionally excessive because "it was substantially below the lowest recommended range" is specious. R. Br. at 29. That "recommendation" was made to the jury by respondent's counsel, and ranged from $21 million to $600 million, which in itself demonstrates the unprincipled nature of the basis on which the jury was told to calculate punitive damages. By the same reasoning, any punitive damage award would pass muster so long as it was lower than the top of some outrageous range requested by the plaintiff's counsel.

III. PETITIONERS' ARGUMENTS WERE PRESERVED

Respondent's argument that Warner-Lambert failed to preserve its claims of error is frivolous. The first Question Presented is whether the punitive damage award conflicts with *State Farm* and *BMW*. *See* Petition at i. Petitioners made this precise argument at every stage of the proceedings below. *See id.* at 7. And the argument was not made in only "three sentences," as respondent suggests (R. Br. at 19), but in numerous pages in petitioners' "Brief in Chief" (opening brief) and reply brief to the Oklahoma Court of Civil Appeals. Petitioners specifically argued that the punitive damage award was unconstitutional because it was based on worldwide sales and had no nexus to any harm to the plaintiff. *See* Appellants' Brief in Chief at 26-29 and Reply Brief at 22-29. *State Farm* was mentioned five times in petitioners' Brief in Chief and 14 times in the reply brief. *BMW* was mentioned twice in the Brief in Chief and once on reply.

Respondent admits that the Court of Civil Appeals "addressed [Warner-Lambert's] arguments under *State Farm* that there was an 'insufficient nexus between the punitive damages and the actual harm suffered by plaintiff,'" and also "addressed [Warner-Lambert's] argument that the award violated the guidelines outlined in *BMW*." R. Br. at 15. "Where the court below actually passes on a

federal question, any inquiry into whether or when the question was raised for jurisdictional purposes becomes irrelevant." *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959). Respondent does not even argue that the second Question Presented (whether the award is unconstitutionally excessive) was not preserved. Nor did respondent argue below that the punitive damages issues were not preserved. Thus, "the record as a whole" shows that the Questions Presented were "adequately presented in the state system." *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987).

Respondent cites Oklahoma cases stating that points of error not contained in appellate briefs are waived. But in each case, the appellant neither made any argument on the claim of error nor cited any authority.[4] In contrast, petitioners extensively briefed the punitive damages issues, based on *BMW* and *State Farm,* in both of their briefs to the Court of Civil Appeals.

Petitioners also asked the Oklahoma Supreme Court to review these issues. Petitioners' Brief in Chief was initially filed with the Supreme Court, which then decided to refer the case to the Court of Civil Appeals. Recognizing that the Supreme Court has already seen the Brief in

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[4] *Oklahoma City Urban Renewal Auth. v. City of Oklahoma City*, ___ P.3d ___, 2005 WL 44399 (Okla. Jan. 11, 2005) (claim of error not briefed); *Johnson v. Ford Motor Co.*, 45 P.3d 86 (Okla. 2002) (nine points of error asserted, but only three briefed); *Tiger Flats Prod. Co. v. Oklahoma Petroleum*, 711 P.2d 106 (Okla. 1985) (claim of error merely alluded to in briefs, without supporting authority); *Peters v. Golden Oil Co.*, 600 P.2d 330 (Okla. 1979) (appellant cited no authority and made no argument to convince appellate court to reverse); *Hardeman v. City of Albuquerque*, 377 F.3d 1106 (10th Cir. 2004) (appellants indicated in their post-trial motion that they were *not* seeking review of a constitutional issue, and thus failed to preserve it); *U.S. v. Zannino*, 895 F.2d 1 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990) (appellant attempted to "adopt" arguments of co-defendants in brief without providing any argument of his own).

Chief, the certiorari process in Oklahoma does not provide for full briefing, but rather for a limited 10-page petition for certiorari. Okla. Sup. Ct. R. 1.179(b). By rule, "[t]he petition, answer, and reply shall not reach the merits of the appeal." Okla. Sup. Ct. Rule 1.179(d).

Respondent argues that petitioners waived their argument that the trial court refused their requested instructions based on *BMW*, 517 U.S. at 572-73, to limit the jury's focus to Oklahoma transactions. Respondent ignores U.S. Supreme Court Rule 14.1(a), which provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Under this rule, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). Respondent admits that after the trial court delivered its instructions to the jury, her counsel asked the jury to calculate punitive damages based on the global profits for Rezulin, triggering the constitutional issue. R. Br. at 29. The trial court's refusal to give instructions, based on *BMW*, that it could not award punitive damages based on out-of-state conduct that had no relationship to any harm to the plaintiff is part of the procedural history "fairly included" in the first Question Presented.[5]

Contrary to respondent's argument (R. Br. at 20), petitioners are not contending that the Oklahoma punitive damages statute is unconstitutional on its face, but that it was "interpreted and applied" in an unconstitutional manner. Petition at 16. Petitioners argued in their Brief in Chief (at 27) that the statute should be interpreted as

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[5] *Howell v. Mississippi*, 125 S. Ct. 856, 858 (2005), cited by respondent, is distinguishable because the petitioner "did not properly present his claim" before the state appellate court "as one arising under federal law." Petitioner also cites Oklahoma Supreme Court Rule 15, but that was repealed in 1997.

limited to financial benefit in Oklahoma that has a nexus to harm to this plaintiff. But the Court of Civil Appeals held that the statute could encompass "world-wide gross sales." A. 17. Under that interpretation, the statute is unconstitutional in light of *BMW* and *State Farm*. That issue arose only after the Court of Civil Appeals failed to interpret the statute in a constitutional manner. Petitioners then raised the issue in their certiorari petition to the Oklahoma Supreme Court. R. Br. at 2a.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

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